

Before
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:

Deferral of Licensing of MTA Commercial
Broadband PCS

GN Docket No. 93-253
ET Docket No. 92-100

GTE Macro Communications Corporation
Applications for PCS Authorizations in

Atlanta, GA (MTA 11B),
Cincinnati-Dayton, OH (MTA 18B),
Denver, CO (MTA 22B), and
Seattle, WA (MTA 24A)

DOCKET FILE COPY ORIGINAL
File No. 00019-CW-L-95
File No. 00033-CW-L-95
File No. 00041-CW-L-95
File No. 00044-CW-L-95

**GTE MACRO COMMUNICATIONS CORPORATION
OPPOSITION TO REQUESTS FOR STAY OF LICENSING**

GTE Macro Communications Corporation ("GTE Macro") herewith files its opposition to the above-captioned requests for stay by the National Association of Black Owned Broadcasters, Inc., Percy E. Sutton, and the National Association for the Advancement of Colored People Washington Bureau (jointly, "Petitioners").¹ As discussed below, these requests do not meet the applicable criteria for extraordinary relief set forth by the Court of Appeals in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559

¹ Petitioners filed a "Petition to Deny and Request for Stay" against each of the 99 applications filed by PCS Block A and B auction winners. Petitioners also simultaneously filed an "Application for Review and Request for Stay" of a Wireless Telecommunications Bureau order denying a petition to defer that was originally filed by Communications One, Inc., an unrelated entity. In substance and relief sought, however, both requests for stay are identical. These petitions were placed on public notice on May 15, 1995. See *FCC Public Notice*, Report No. CW-95-3 (May 15, 1995). Although Petitioners have created some confusion by impermissibly filing their requests for stay coupled with other pleadings, see 47 C.F.R. § 1.44(e) (1994), GTE Macro will file its oppositions as if these requests were filed as separate pleadings. Accordingly, GTE Macro will file its opposition to the Petitions to Deny on May 25, 1995, and its opposition to the Petition for Review on May 30, 1995.

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F.2d 841 (D.C. Cir. 1977) ("*Holiday Tours*"), and *Virginia Petroleum Jobbers v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) ("*Petroleum Jobbers*"). Accordingly, GTE Macro requests the Commission to dismiss the requests summarily.

ARGUMENT

Petitioners have requested the Commission to stay the grant of any of the applications for 2 GHz Personal Communications Service ("PCS") authorizations filed by the Block A and B Major Trading Area ("MTA") auction winners. In order to justify their request for extraordinary relief, Petitioners argue that the Commission's failure to provide specific designated entity benefits in the Block A and B license auctions, in conjunction with the auction scheduling, fails to satisfy the Congressional mandate to increase diversity in radio license ownership. In particular, Petitioners contend that the Commission's policies will create a competitive headstart for non-designated entity licensees and that the Commission's policies have already allowed dominant carriers to divide the PCS market geographically. As discussed below, these claims do not warrant the relief requested.

To justify the extraordinary relief represented by a stay of an administrative order, the *Holiday Tours* case requires consideration of the following four factors:

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits? . . .
- (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . .
- (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . .

(4) Where lies the public interest?²

Petitioners have not made the showings necessary to support a request for stay under any of these criteria.

Petitioners have not made a strong showing that they are likely to prevail on the merits. Petitioners' argument that the Commission should provide for additional designated entity benefits is the same position that has been previously rejected in numerous contexts.³ First, Petitioners' argument that the Block A and B licensees will be able to enter the market before Block C licensees is a necessary consequence of the Commission's auction timing policies, and does not constitute new grounds for any reexamination of any Commission policies.⁴ Although the C Block auctions were delayed somewhat beyond the original schedule announced by the Commission, that delay resulted from an action by the Court of Appeals over which the Commission had no control. Moreover, the basis for the delay has been resolved and Petitioners allegation that "it is unlikely the C Block Auction will begin on

² 559 F.2d at 842 (citing *Petroleum Jobbers*, 259 F.2d at 925).

³ *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 2348 (1994) (Second Report and Order); 9 FCC Rcd 5332 (1994) (Fifth Report and Order); 9 FCC Rcd 4493 (1994) (Order on Reconsideration); 9 FCC Rcd 7245 (1994) (Memorandum Opinion and Order); 9 FCC Rcd 6858 (1994) (Fourth Memorandum Opinion and Order); 9 FCC Rcd 7684 (1994) (Memorandum Opinion and Order); 10 FCC Rcd 403 (1994) (Fifth Memorandum Opinion and Order); *New Personal Communications Services*, 9 FCC Rcd 4957 (1994) (Memorandum Opinion and Order); 9 FCC Rcd 6908 (1994) (Third Memorandum Opinion and Order); *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 7132 (1994) (Fourth Report and Order).

⁴ The scheduling of the auctions was determined in an order by the Commission in October of 1994. *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 6858, *recon.* 9 FCC Rcd 7684 (1994). Notably, no party, at the appropriate time, claimed that the ordering of the auctions discriminated against designated entities.

August 2, 1995⁵ is entirely speculative. The Commission, in fact, has indicated that it intends to proceed expeditiously with all remaining auctions.⁶

Second, Petitioners' insinuations that an implicit market division has occurred are unsupported and the linkage between the postulated illegal activity and the ability of designated entities to compete is tenuous at best. Indeed, GTE Macro is not a party to any of the consortia identified in the requests for stay, and Petitioners have offered no specific factual allegations that GTE Macro -- or any other licensee -- has engaged in conduct that does not comply with the Commission's anti-collusion rules. Furthermore, the argument that the recent auction of licenses has had a "chilling" effect on the ability of designated entities to enter the PCS market is nothing more than speculative conjecture. The fact of the matter is that the ability of designated entities to enter the PCS market or raise the necessary capital will be a function of their marketing and management expertise, rather than speculative assumptions concerning market dynamics.

⁵ Petition at 4. The original delay in the Block C auctions was the result of a stay issued by the D.C. Court of Appeals in *Telephone Electronics Corp. v. F.C.C.*, C.A. No. 95-1015, *slip op.* (D.C. Cir. Mar. 15, 1995). This appeal has now been dismissed and the stay dissolved. *Telephone Electronics Corp. v. F.C.C.*, C.A. No. 95-1015, *slip op.* (D.C. Cir. May 1, 1995). Petitioners' assertion that potential delays could arise from a waiver request by Consolidated Communications, Inc. is also moot, since the waiver request has been withdrawn. See Letter to William S. Caton from Veronica M. Ahern, Counsel to Consolidated Communications, Inc. (dated May 5, 1995). Petitioners also note the existence of a request for stay filed by Radiofone, Inc., but that request raises issues relating to cellular/PCS cross-ownership that are entirely different from the issues raised by Petitioners. Finally, Petitioners assert that "it is possible that the Court [of Appeals] may issue another stay," but fail to note that no procedural vehicle exists for the Court to consider such a request at this time.

⁶ See, e.g., *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 6858 at ¶32 (1994).

Petitioners have not provided any new legal or factual basis for revisiting the legality of the Commission's designated entity policies, much less a showing that such policies are likely to be reversed upon review. These policies were adopted pursuant to public notice and comment proceedings and have become final orders. Petitioners' attempt to relitigate these issue in a licensing action is unwarranted, untimely, and improper.⁷ Under the circumstances, Petitioners have not carried their burden of demonstrating a strong showing of likelihood of success on the merits.

Petitioners have not shown that they will be irreparably injured absent the requested stay. Petitioners argue that, if the Commission proceeds with Block A and B licensing, they will be disadvantaged by potentially losing access to capital, base station cell sites, distributors and resellers, and market share. These arguments are entirely speculative and do not, in any event, constitute "irreparable injury." First, given that the Commission has *set aside* spectrum for entrepreneurs, any "loss of access to capital" as a result of the auction timing would, if true, act uniformly to depress the overall costs of license acquisition in the auctions, potentially resulting in *lower* capital costs for designated entities and an *improved* ability to compete.⁸ Second, given the sheer number of cell sites required for microcellular PCS

⁷ See *Hispanic Information & Telecommunications Network*, 865 F.2d 1289, 1294 (D.C. Cir. 1989); *Broadcast Corp. of Georgia (WVEU-TV)*, 96 F.C.C.2d 901, 907 (1984); *F.T.C. v. Brigadier Industries Corp.*, 613 F.2d 1110, 1117 (D.C. Cir. 1979).

⁸ In contrast to Petitioners' arguments, the Commission's *Fourth Memorandum Opinion and Order* notes that one potential designated entity, BET Holdings, Inc., argued that "the Commission [should] affirm the sequence of the PCS auctions, [since] any market advantage afforded successful A and B block bidders from entering the market before the designated entities *will be more than offset* by the availability of price information and the accessibility of capital made available to designated entities by frustrated early bidders." *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 6858 at ¶27 (1994) (emphasis added).

systems, the routine cycle of loss and acquisition of cell sites that occurs in all radio services, and the unlikely prospects of PCS licensees obtaining *exclusive* leases on potential tower sites, the potential for wholesale loss of "prime" locations is negligible. Finally, even if later market entrants lose market share or potential distribution avenues, any such losses would be temporary in a competitive market.⁹ Because Petitioners have not demonstrated "irreparable injury," their requests for stay must be denied.

Issuance of a stay will cause substantial harm to other interested parties. Although Petitioners focus exclusively on asserting, quite mistakenly, that there will be no harm to applicants caused by a stay,¹⁰ Petitioners ignore the most damaging aspect of issuing the requested stay -- the effect of delay upon the public. Any delay in issuing licenses to the Block A and B auction winners will deny the public access to new PCS offerings and the benefits of added competition in wireless services. Indeed, the Commission explicitly rejected arguments to delay finalizing license awards to avoid competitive advantage over winners in later auctions "because of the *overriding* public interest in rapid introduction of service to the

⁹ See *Holiday Tours*, 559 F.2d at 843 (noting that "[t]he mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact"). Contrary to Petitioners' claims, the Commission is not required to ameliorate any and all competitive imbalances between competitors under the Communications Act. As the Commission has previously noted, "[t]he issue is not whether [a competitor] has advantages, but, if so, why and whether any such advantages are so great as to preclude the effective functioning of a competitive market." *Competition in the Interexchange Marketplace*, 6 FCC Rcd 5880, 5891-92 (1991).

¹⁰ Contrary to Petitioners' assertions, any licensing delays subject the applicants to specific, tangible, and substantial harms. As an initial matter, GTE Macro has already tendered to the Commission its deposit that could be used by GTE to expand other telecommunications services. Furthermore, given the vast capital costs of license acquisition, PCS deployment schedules have been developed, resources set aside, and contracts and agreements entered into in reliance on the Commission's prior statements that licenses would be expeditiously granted. Any delay in grant of the licenses thus has severe fiscal consequences for the applicants.

public.”¹¹ Expediting the provision of new services for the public, in fact, was one of the Commission’s four primary policy goals driving the PCS rules and policies and one of Congress’s enumerated mandates in both the *Communications Act* and the *Omnibus Budget Reconciliation Act of 1993*.¹² The public should not be denied the benefits of competition and new offerings on the basis of the Petitioners’ speculative showings.

The public interest would not be served by delaying grant of applications. The Commission should summarily reject Petitioners’ requests for stay of the issuance of Block A and B licenses. The policies attacked by the Petitioners were adopted in notice and comment proceedings, are now final, were relied upon by the applicants, and fully discharge the Commission’s obligations under the *Omnibus Budget Reconciliation Act*. Moreover, the balancing of harms in this case pits speculative, remote potentialities against the concrete, substantial harm resulting from denial of new and competitive services to the public. Under the circumstances, the public interest is served by denying the requested stay.

CONCLUSION

Petitioners’ requests for stay do not satisfy any of the four criteria for evaluating petitions for extraordinary remedies announced in the *Holiday Tours* case. GTE Macro

¹¹ *Implementation of Section 309(j) of the Communications Act*, 9 FCC Rcd 6858 at ¶32 (emphasis added).

¹² See *New Personal Communications Services*, 8 FCC Rcd 7700, 7704 (1993) (identifying “speed of deployment” as a one of four objectives for PCS); *Omnibus Budget Reconciliation Act of 1993*, § 6002, Pub. L. No. 103-66, 107 Stat. 388 (1993) (stating that competitive bidding policies “shall seek to promote . . . the rapid deployment of new technologies, products, and services for the benefit of the public . . . without administrative . . . delay”); 47 U.S.C. §157 (1991) (noting that “[i]t shall be the policy of the United States to encourage the provision of new . . . services to the public”).

accordingly urges the Commission to deny Petitioners' requests summarily and process expeditiously the Block A and B applications to grant.

Respectfully submitted,

**GTE MACRO COMMUNICATIONS
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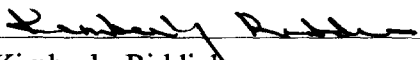
CERTIFICATE OF SERVICE

I, Kimberly Riddick, hereby certify that on this 19th day of May, 1995, I caused copies of the foregoing "GTE Macro Communications Opposition to Requests for Stay of Licensing" to be mailed, first-class, postage pre-paid, to the following:

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